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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JEFFREY FRANKLIN,

Plaintiff and Appellant,

v.

KIM HOLLAND et al.,

Defendants and Respondents.

F075438

(Super. Ct. No. CV-15-100808)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Jeffrey Franklin, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Monica N. Anderson, Assistant Attorney General, Neah Huynh and Cassandra J. Shryock, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiff Jeffrey Franklin (Franklin), who is incarcerated in state prison, sued nine prison officials for intentional deprivation of the use of his personal property and violating his federal constitutional rights.¹ The trial court sustained the prison officials'

¹ The prison officials sued as defendants are Kim Holland, J. Wood, D. Rosander, M. Dailo, J. Zanchi, J. Cable, R. Sanchez, J. Beard, and J.D. Lozano.

demurrer to Franklin’s second amended complaint with leave to amend on the first claim and without leave to amend on the second. The trial court dismissed the action after Franklin chose not to file a third amended complaint. On appeal, Franklin argues the trial court erred in sustaining the demurrer and not giving him leave to amend his federal claim. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Franklin is an inmate who at all relevant times was incarcerated at California Correctional Institution (CCI) in Tehachapi, California, and is representing himself. He initiated this action in Kern County Superior Court in August 2015. The prison officials’ demurrers to the initial and first amended complaints were sustained with leave to amend.²

Franklin filed a second amended complaint in September 2016, in which he asserted two causes of action: (1) a state law cause of action for “[i]ntentional deprivation of property use”; and (2) a federal constitutional claim under Title 42 United States Code section 1983 (section 1983), for “First/eighth Amendment [violation]; Failure to accommodate learning impaired [prisoner] during exhaustion of administrative grievance process, preventing-42 U.S.C. 1997e[,] Subd. (a).”³ Franklin sought to recover compensatory and punitive damages on both claims. He also alleged, at the end of his allegations on the federal civil rights claim, that he sought injunctive and declaratory relief, as the prison officials “acted with reckless disregard in their treatment of [his]

² The demurrer to one of the causes of action pleaded in the first amended complaint was sustained without leave to amend. Neither the original or first amended complaint, nor the demurrers, are in the appellate record, as Franklin did not designate them for inclusion.

³ Title 42 United States Code section 1997e(a) provides: “No action shall be brought with respect to prison conditions under [section 1983 of this title], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

learning impaired condition status,” so they would not have to decide the merits of his property claims via the appeal process.

Franklin alleged that in June 2014, while he was housed at CCI, defendants Cable and Sanchez “forwarded three of [Franklin’s] five seized boxes of personal property” to his “housing unit ... without providing accurate itemization property receipt(s).” When Franklin asked for a receipt, his personal property was returned to Cable and Sanchez. Six days later, Cable and Sanchez “re-forwarded [Franklin’s] personal property” to his “housing unit.” When Franklin “received three of the five seized boxes of personal property,” he discovered that 14 of his books were defaced, with his last name and prison number written on the side of the pages with a red marker. Franklin complained about the two withheld boxes, but a nonparty told him the boxes were not released to him because he had reached his limit for allowable property in his cell. Franklin, however, was able to exchange items he already had with items from those boxes. Franklin alleged Cable and Sanchez improperly refused to “return/release [his] with[]held personal property items” and provide itemized property receipts of those items, and the remaining defendants failed to properly process his inmate appeals on this issue or ensure the appeals were processed properly.

Franklin alleged the prison officials violated his federal civil rights because they were deliberately indifferent to his “learning disable[d] condition status” by “disregard[ing] [his] numerous demands to be accommodated, ... by providing the required equal access” to the process for completing inmate appeals about his property issue. Franklin further alleged he needed “timely assistance” to ensure he could satisfy the requirements of Title 42 United States Code section 1997e(a), but the prison officials rejected and cancelled his appeals, thereby forcing him to find “limited help” from other prisoners who were willing to assist him in filing his appeals and depriving him of his First Amendment rights.

The prison officials demurred to the second amended complaint (SAC). Franklin did not designate the demurrer for inclusion in the appellate record.

By the February 1, 2017 hearing on the demurrer, there was no written opposition, or motion for extension of time to file an opposition, on file with the court. The record on appeal does not include a reporter's transcript of the hearing, or a suitable substitute such as a settled or agreed statement. According to the court's minute order of the hearing, Franklin appeared telephonically, while the prison officials' attorney personally appeared, and the matter was argued and submitted. The trial court sustained the demurrer "for the reasons set forth in the underlying papers and as stated herein." The trial court found the SAC "fail[ed] to state any cognizable claim with respect to constitutional violations of equal protection or due process," but "[e]ven if such claim had been set forth, [Franklin]'s SAC seeks money damages," which according to California case law was not recoverable for a violation of the state Constitution's due process or equal protection clauses. Therefore, "to the extent the first and second causes of action seek money damages for equal protection and/or due process violations," the demurrer was sustained without leave to amend.

With respect Franklin's state law claim, the trial court found: "To the extent [Franklin] seeks money damages under a state law claim of damage to personal property or loss of use of personal property, the demurrer is sustained on uncertainty grounds. The court notes that the SAC admits that '[t]hese property items [were] not returned/released to plaintiff because plaintiff already had been issued his step-4 property limit on June 11, 2014.' (SAC, pg. labeled 4 of 22). This suggests that [Franklin] was not intentionally deprived of his personal property, but that officials were following established procedure for excess property." The trial court gave Franklin 30 days, until March 1, 2017, to amend the "property claim" if he opted to do so. Franklin was directed to clarify his claim and set forth specific facts as to each defendant against whom the claim is asserted

in concise language. The trial court stated it was not expressing an opinion on whether such a property claim would be viable or on immunity.

On February 6, 2017, Franklin's "motion for an enlargement of time for which to file opposition" to the demurrer was filed, which he signed on January 27, 2017.

Franklin asserted the prison had been on lockdown for most of January 2017, and he would not be able to access the prison law library to prepare the opposition until January 31, 2017. He asked to be given until January 31, 2017, to file the opposition.

Franklin's opposition to the demurrer also was filed on February 6, 2017. Franklin argued the demurrer should be overruled because: (1) the SAC "set forth facts in paragraphs I-VI" that prison officials had "wrongfully dispossessed" him of his personal property, which they refused to return or release, therefore the SAC may be construed to allege each prison official was liable for conversion for refusing to return the two boxes of his personal property; (2) the SAC states a cause of action against the prison officials under section 1983, "[a]s set forth in paragraphs X-XV," since it alleges they refused him adequate or proper accommodation with respect to his learning impairment, which was also a violation of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) (ADA); (3) the prison officials were mistaken that he did not have a protected liberty interest in the processing of his inmate appeals; and (4) the prison officials were not entitled to immunity under Government Code sections 820.2 and 820.8. Franklin asked that he be allowed to proceed with the SAC "in it[]s entirety or amended."

At the March 2, 2017 hearing on Franklin's motion for enlargement of time to file his opposition, the trial court denied the request as moot.

On March 17, 2017, after the deadline to file an amended complaint had passed, the prison officials applied ex parte for an order dismissing the action with prejudice under Code of Civil Procedure section 581, subdivision (f)(2). The trial court granted the application on March 20, 2017, but made the dismissal effective April 3, 2017, as long as an amended complaint had not been filed by then. On April 3, 2017, when Franklin still

did not file an amended complaint, the action was dismissed with prejudice. Franklin filed a notice of appeal from the February 1, 2017 order on April 5, 2017.

DISCUSSION

Franklin contends the trial court erred in determining his federal constitutional claim was not actionable or curable when the court found California law prohibited the claim because he seeks monetary damages. Franklin asserts his federal claim is “not subject to any state law rule” and an action for monetary damages may be brought under section 1983. He further asserts the trial court “abused its discretion” because the SAC “could be construed to encompass multiple theories” under section 1983 or the ADA, “some of which would not necessarily be contradicted” in a third amended complaint “without contradicting any of the allegations of his original complaint,” and the trial court “ignored” that his claim also was actionable under Civil Code section 52.1. Finally, Franklin contends the trial court abused its discretion in ruling on his state law claim without considering his late-filed opposition, which made clear the claim was for “ ‘wrongful conversion.’ ”

Standard of Review

“ ‘A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court’s ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. [Citations.]’ [Citation.] ‘Because only factual allegations are considered on demurrer, we must disregard any “contentions, deductions or conclusions of fact or law alleged [in the complaint].” ’ ” (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1172-1173.) “The judgment must be affirmed ‘if any one of the several grounds of demurrer is well taken.’ ” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

“[B]ecause the demurrer at issue is to an amended complaint, we may properly consider allegations asserted in the prior complaints: ‘ “[A] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading.” ’ ” (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957 (*Pacific Lumber*).)

“When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer.” (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312 (*County of Santa Clara*).) Where the demurrer is sustained without leave to amend, however, we must determine whether the plaintiff has proven a reasonable possibility that the pleading’s defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the plaintiff meets that burden, we must reverse the trial court’s order as an abuse of discretion. (*Ibid.*)

The fact that we examine the SAC de novo does not mean Franklin need only tender the complaint and hope we can discern a cause of action; it is his “burden to show either that the demurrer was sustained erroneously or that the trial court’s denial of leave to amend was an abuse of discretion.” (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.)

Inadequacy of the Appellate Record

We presume that a judgment or order of the trial court is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.) Demonstration of error alone, however, is insufficient to warrant reversal. An appellant must also demonstrate prejudice, in the form of a miscarriage of justice, based on an examination of the entire record. (*In re Marriage of Falcone & Fyke, supra*, at pp. 822-823.) “A necessary corollary to this rule would seem to be that a record is inadequate, and appellant defaults, if the appellant predicates error

only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.” (*Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.)

A party appealing an adverse judgment has the burden of providing an adequate record in order to show error and prejudice. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-187 [discussing various situations requiring a reporter’s transcript or agreed or settled statement on appeal]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [record is inadequate for review where the appellant has not included moving papers, opposition or court’s order].) “We cannot presume error from an incomplete record.” (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1412.) If the plaintiff fails to provide an adequate record to support a claim, the issue must be resolved in the respondent’s favor. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

In this case, the record on appeal Franklin provided does not include a record of the oral proceeding of the hearing on the demurrer, nor does it include the prison officials’ demurrer, the original and first amended complaints, or the demurrers to those complaints. Without the demurrer to the SAC, we have no way of determining the prison officials’ arguments. The absence of a record of oral proceedings, combined with the failure to include the demurrer, precludes effective appellate review of the merits as well as Franklin’s contentions the dismissal of the federal constitutional claim should have been without prejudice and the trial court abused its discretion in ruling on the demurrer without considering his written opposition. Without a record of what issues were presented in the demurrer, and the arguments made at the hearing, we are left to presume the judgment is correct and Franklin has not shown reversible error. (See *Foust v. San Jose Construction Co., Inc.*, *supra*, 198 Cal.App.4th at pp. 186-187; *Hernandez v. California Hospital Medical Center*, *supra*, 78 Cal.App.4th at p. 502.)

We are aware Franklin brings this appeal without the benefit of legal representation. Franklin, however, is not exempt from the foregoing appellate procedure because he is representing himself in propria persona. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.) “ ‘[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys.’ ” (*Id.* at p. 1247.)

The Demurrer

Even if we were to consider the merits, we would affirm.

With respect to the federal constitutional claim, Franklin appears to challenge only the trial court’s ruling that he could not maintain an action for money damages for violations of the due process or equal protection clauses. The trial court, however, also sustained the demurrer on another ground, namely, that the SAC “fails to state any cognizable claim with respect to constitutional violations of equal protection or due process.” We must affirm the judgment if the sustaining of a general demurrer was correct for any of the reasons stated in the demurrer. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967.) By failing to address the additional ground upon which the trial court sustained the demurrer, Franklin fails to show error.

In any event, as the prison officials point out, Franklin did not plead a constitutionally protected right to which they violated. Franklin’s federal claim is based on section 1983. To state a section 1983 claim, a plaintiff must allege a defendant, acting under color of state law, deprived the plaintiff of a right secured by the Constitution or federal statutes. (*Karim-Panahi v. Los Angeles Police Dept.* (9th Cir. 1988) 839 F.2d 621, 624.) A deprivation occurs when an individual “ ‘does an affirmative act, participates in another’s affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains].’ ” (*Leer v. Murphy* (9th Cir. 1988) 844 F.2d 628, 633.) Generally, vicarious liability may not be imposed on supervisory personnel in the absence of a state law imposing such liability.

(*Redman v. County of San Diego* (1991) 942 F.2d 1435, 1446.) A supervisor, however, may be liable if he or she was personally involved in the constitutional deprivation or there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. (*Ibid.*)

The SAC alleges the prison officials acted with "deliberate indifference to plaintiff's learning disable[d] condition status" by (1) not providing "aid for, equal access and timely assistance necessary" for him to participate in the inmate appeals process, (2) "recklessly disregard[ing]" his "numerous demands" for accommodation, (3) "deliberately depriv[ing] [him] of his learning impaired status" by modifying that status "without ever affording [him] the required safeguards," (4) "screening out, rejecting, and/or cancelling" his inmate appeals "without affording him the requisite equal access and accommodations necessary for full and complete participation/exhaustion," and (5) failing or refusing to object to the modification of his learning impaired status and denial of equal access to the inmate appeals process. Although Franklin mentioned the First and Eighth Amendments in the SAC, he did not specify a right guaranteed under either of those amendments that was allegedly violated or how any defendant violated that right.

Essentially Franklin's complaint is that he did not receive the assistance he needed due to his learning disability during the inmate appeals process. While Franklin categorizes this failure as a violation of his First Amendment right, his allegation implicates the due process clause, not the First Amendment, which guarantees the freedom of speech and not the right to receive assistance. There is no constitutional right to an inmate appeals process, however, as the Ninth Circuit has held that prisoners do not have a "separate constitutional entitlement to a specific prison grievance procedure." (*Ramirez v. Galaza* (9th Cir. 2003) 334 F.3d 850, 860.) The failure of prison officials to properly implement an administrative appeals process does not raise constitutional concerns. (*Mann v. Adams* (9th Cir. 1988) 855 F.2d 639, 640.) Moreover, the mere

failure to process a prison grievance is not actionable under section 1983. (*Buckley v. Barlow* (1993) 997 F.2d 494, 495.) Accordingly, Franklin may not impose liability on a defendant simply because that individual played a role in processing his appeals or because the process was otherwise rendered unfair.

Franklin also cannot state an equal protection claim. To state a section 1983 claim based on a violation of the equal protection clause, Franklin was required to plead facts demonstrating the prison officials intentionally discriminated against him as a member of an identifiable class (*Flores v. Morgan Hill Unified School Dist.* (9th Cir. 2003) 324 F.3d 1130, 1134-1135), or selected or affirmed a particular course of action at least in part because of its adverse effects on an identifiable group (*Personnel Administrator of Massachusetts v. Feeney* (1979) 442 U.S. 256, 279). Franklin, however, only generally alleged the prison officials failed or refused to object to “modifying of [his] learning impaired status.” He did not plead facts showing any defendant rejected, screened-out or cancelled any of his inmate appeals with the intent to discriminate against him because of his learning disability. Accordingly, he did not state an equal protection claim against any defendant. (*Simmons v. Evans* (9th Cir. 2011) 442 Fed.Appx. 271, 272, citing *Thornton v. City of St. Helens* (9th Cir. 2005) 425 F.3d 1158, 1166-1167.)

Because Franklin did not plead a constitutionally protected right which the prison officials allegedly violated, or allege the prison officials engaged in any affirmative action that deprived him of such a right, he did not state a claim under section 1983. Therefore, the trial court did not err in sustaining the demurrer to that claim.

With respect to the state law cause of action concerning his property loss, Franklin only challenges the trial court’s failure to consider his written opposition to the demurrer, not the propriety of the ruling sustaining the demurrer due to uncertainty. Franklin appears to contend the trial court should have continued the hearing on the demurrer until it received his untimely opposition papers. Franklin alludes to arguments he made to the trial court during the hearing, but without a transcript of what occurred at the hearing, we

cannot determine what, in fact, Franklin argued or whether he requested a continuance. Even if Franklin made such a request, the trial court did not abuse its discretion by hearing the demurrer as scheduled, as Franklin had nearly two months' notice of the hearing, yet he had not filed a request to continue the hearing or his opposition.

Moreover, Franklin has not shown prejudice, as he appeared at the hearing and presumably was able to make the arguments contained in his written opposition, and the trial court granted him leave to amend the state law cause of action. Franklin contends he was prejudiced because he could not amend his state law claim without waiving his right to appeal the trial court's determination that he had not stated a federal constitutional claim. Franklin, however, is mistaken, as the general rule that an appellate court will not consider the allegations of a superseded complaint does not apply where the trial court has sustained a demurrer without leave to amend the causes of action a plaintiff seeks to reinstate on appeal. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209, superseded by statute on another point as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228; see *County of Santa Clara, supra*, 137 Cal.App.4th at p. 312 ["[t]he rule that a choice to amend waives any error can reasonably be applied only on a *cause-of-action-by-cause-of-action basis*"].) Even if Franklin had amended his state law property claim, he could still have challenged the earlier ruling sustaining the demurrer on his constitutional claims in an appeal from the subsequent judgment. (*County of Santa Clara, supra*, at p. 312.)

Leave to Amend

Franklin has failed to meet his burden to show he could amend the SAC's federal constitutional claim to state a cause of action. To satisfy his burden to show what facts he could plead to state a cause of action, Franklin "must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890.)

Franklin does not specify how the SAC may be amended to establish a cognizable federal constitutional claim. While he asserts the SAC “could be construed to encompass multiple theories” under section 1983 or the ADA, he does not present a cogent argument on appeal as to what facts he would plead to establish such theories, or how those facts would establish a cause of action under either statute. He also asserts the trial court “ignored” Civil Code section 52.1, which allows any individual whose exercise or enjoyment of his or her constitutional or statutory rights has been interfered with, or attempted to be interfered with, by threats, intimidation, or coercion, to sue the perpetrator for damages. (Civ. Code, § 52.1, subds. (b) & (c); *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 842.) Franklin, however, does not articulate what additional facts he could plead to state a claim under that statute.⁴

In sum, Franklin has not shown in what manner he could amend the SAC or how that amendment would change the legal effect of the pleading. Accordingly, the trial court did not abuse its discretion in sustaining the prison officials’ demurrer to his federal constitutional claim without leave to amend.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

DE SANTOS, J.

WE CONCUR:

POOCHIGIAN, Acting P. J.

PEÑA, J.

⁴ Moreover, without the prior complaints in the record, we cannot tell whether any proposed amendment would contradict Franklin’s prior allegations. (*Pacific Lumber, supra*, 158 Cal.App.4th at p. 957.)